INTRODUCTION
OF
EQUITY JURISDICTION
INTO
MARYLAND

NEWBOLD

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NOTES

ON THE

INTRODUCTION

OF

EQUITY JURISDICTION

INTO

MARYLAND

1634—1720

BY

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To

O. P. N.

PREFACE.

Several years ago the writer had occasion to examine the early Maryland Reports concerning a question of equity pleading, and by chance happened upon the case of the Proprietary vs. Jenings, found in 1 H. & McH. page 61. It was instituted Dec. 8, 1733, and reported under the head of "Chancery Court." The question of the origin of the court suggested itself at once and curiosity prompted a continuance of this phase of the investigation. The result was not satisfactory. But two other cases were found which cast any light upon the subject; that of Townshend vs. Duncan, 2 Bland, page 40, in which the Court of Chancery was shown to be in existence as early as 1670, and a note to the "Chancellor's Case" in 1 Bland, page 624. But when equity jurisdiction was introduced into Maryland, how the Court of Chancery came into existence and the nature of its constitution, were questions that remained unanswered.

In quest of further knowledge of this interesting subject, every work, known to the author, legal or historical, was perused, and the surprising fact developed that no bibilography of this subject was extant, barring a magazine article, referred to elsewhere, in which but one page was devoted to colonial Maryland.

The writer thereupon began a careful and systematic examination of original sources for information; the fact that he was exploring territory hitherto unknown stimulating his curiosity and sustaining his interest.

The work was continued at intervals as opportunities were afforded. A great deal of time would frequently elapse between the collection of the materials and their collation and arrangement into literary form, which no doubt shows itself in a lack of coherence and continuity. Yet the results obtained have been so interesting to the author that he has determined to lay them before his professional brethren with the hope that they may prove of equal interest to them.

The length of this essay is in inverse proportion to the labor bestowed upon it and it should not lack support for "failure of consideration." Its brevity is not the least of its merits. It was charged against Mrs. Malaprop's letters that they contained many superfluous words that could have "obtained their habeas corpus from any court in christendom." It is hoped that this work is free from such defects.

At any rate no reader of this little book need seek the aid of a Court of Equity for "Relief," since he has the permission of the author to obtain it in the nearest waste basket.

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Spence's Equitable Jurisdiction, Vol. 1.

Coke's Institutes, Vol. 3.

Hayne's Outlines of Equity.

Phelps' Juridical Equity.

Parke's History of the Court of Chancery.

"Early Cases in Chancery," publication of the Selden Society.

Calendar of Proceedings in Chancery, Vol. 1.

Blackstone's Commentaries, Vol. 3.

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Campbell's Lives of the Lord Chancellors, Vol. 3.

Courts of Chancery in America, 18 Am. Law Rev., p. 226.

Original Records of the proceeding of the Court of Chancery in the Land Office, at Annapolis, Maryland.

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CHAPTER I.

STATE OF EQUITY JURISDICTION IN THE SEVENTEENTH CENTURY.

PART ONE.

EQUITY IN THE COLONIES.

Prior to the Revolution no Court of Chancery, as such, having exclusive Equity Jurisdiction, existed in any of the American Colonies, though almost from the beginning, in one form or another, we find that Jurisdiction being exercised. The Bodies which usually acted as Courts of Equity in these early times were the General Assembly, the Governor and Council, and to a limited extent the Common Law Courts.

In Massachusetts, as early as 1640, we find the General Court, as the Assembly was called, exercising this jurisdiction, a function it continued for nearly fifty years. In May, 1685, an Act was passed which gave to the Magistrate of each "County Court power to act as a Court of Chancery," with right of appeal to the "Court of Assistants." Soon after, the Charter was abrogated and the exercise of Equity powers was assumed by the Governor and Council. By the Act of 1692 a "High Court of Chancery" was actually provided for, to be presided over by the Governor or *Chancellor* and eight or more members of the Council, but no Court was ever established under this Act.

In New York and Pennsylvania, the Governor, and later the Council, when called upon, exercised Chancery powers. In 1684 a "Provincial Court" was established, and it, with every other Court, was to be as well a Court of Equity. In 1690 this jurisdiction in cases involving less than ten pounds sterling was extended to the County Courts. In the remaining New England Colonies, the Governor and Council, among their other functions, acted as Equity Courts.

But for some reason or other this method of administering Equity was found unsatisfactory, and by the year 1700, throughout all the Middle and Northern Colonies, it was recognized that a Court of Chancery, as such, was a crying need, "many people," as the complaints run, "being liked to be ruined for want of one." In the reports made from time to time by the Colonial Governors to Home authorities, we find that the people "groaned" for want of Equity and that they were "pelted with petitions" to establish such Courts.

The authors of the reports usually sympathized with such views and no doubt would have acted accordingly had it not been largely held by the Lawyers of the New England Colonies, as well as by the Home Government, that these Colonies could not establish Chancery Courts under their Charters.

By the absence of similar complaints it would seem that Virginia and Maryland must have fared better. In the former, by the Act of 1645, the "County Courts" were to have jurisdiction in all cases, both at Law and in Equity, while the "General Court," as the Assembly was called, exercised Chancery powers both original and appellant.

To trace its origin and development in the latter Colony, is the subject of this essay, and it will be interesting to note how principles of law and rules of procedure, which originated under far different conditions, were transplanted and grew into a system adapted to the needs of a new Colony. That this was accomplished without violent constructions or fanciful interpretations is an abiding example of the ideas of Government under the Law so deeply imbedded in the Anglo-Saxon race.

PART TWO.

IN ENGLAND.

Maryland was settled by English men who founded here a Government based upon that prevailing in the Mother Country.

The institutions they introduced here were patterned upon those which they had just left at home, and among them was

that system of the Law, operating through the High Court of Chancery which we know as "Equity Jurisdiction."

Its development here forms the subject of this Essay, but before proceeding with the main topic of this work we will depart from the Doctrine of "Medias res" laid down by Virgil, J., in the matter of Aeneas and beginning at the beginning, take a hasty glance at Equity Jurisdiction as it existed in England at the time of its introduction into Maryland.

During the period which will be under consideration, the first half of the Seventeenth Century, Equity Rules and Procedure did not constitute the well defined scientific system, we know to-day. The proper boundaries of that Jurisdiction were as yet unascertained and undetermined. It was still in a period of transition undergoing a contraction upon its criminal and an orderly extension upon its civil sides, while considerable confusion still prevailed as to the application of well known principles.

We will find this condition reflected here to the bewilderment of any investigator who would expect to discover examples of Equity Law similar to those set out in Volume ninety-nine of the Maryland Reports.

From the end of the reign of Richard II, we may consider that the Court of Chancery was established as an independent Court having separate jurisdiction. But that jurisdiction was in many respects far more extensive than it is to-day.

It is a common error to suppose that equity grew and developed by a gradual encroachment upon the domain and at the expense of the Common Law. Almost the reverse of this is true. Many subjects which formerly were exclusively within the scope and province of the chancellors jurisdiction were gradually assumed by the Courts of Common Law. Principles of Equity as they became better understood were increasingly adopted and applied and formed the controlling principles in the action of Assumpsit. Thus the extensive subjects of Executory and Implied Contracts and even trusts under the form of "Bailments," at first exclusively within the jurisdiction of the chancellor, upon the introduction of the action of Assumpsit, gradually passed over into the domain of the Common Law.

With "no relief at Law" as a basis, the Chancellor, in early

times, assumed to redress every grievance of whatsoever nature which outside of the exercise of his jurisdiction, would have been without remedy, as will appear by a reference to that part of Spence's book devoted to the "obsolete jurisdiction" of the Court of Chancery.

Even as late as the time of Lord Ellesmere (Chancellor 1603–1617) we find him claiming broadly in his "Treatise" that Equity "is the refuge of the poor and afflicted. It is the altar and sanctuary for such, against the might of rich men and the countenance of the great."

Most of the early petitions addressed to the Chancellor were in cases of assault and trespass, embracing a variety of outrages which were cognizable at Common Law, but for which the petitioner claimed that "he was unable to obtain redress owing to the position or powerful connections of his adversary."

Indeed the Court exercised a quasi criminal jurisdiction, a delightfully curious instance of which is disclosed in the case of *Hoigges v. Harry,* set out below, which was in substance a bill for an injunction for protection against a criminal outrage, a species of suit far beyond the furthest bounds of Equity jurisdiction to-day.

> The Bill was filed by the Plaintiff, an attorney, to restrain the Defendant, a priest, from practicing witchcraft against him.
>
> It is addressed "To the ryght worthy & reverent Holyfader & his gracious Lord My Lord of Bathe and Chaunceler of Engelond." It recites that the Plaintiff was attorney in a suit against "Aleyn ye Priour of Bodmyne" and that the defendant, Harry, was a priest and servant of the Prior. That he of "malys and evele wylle" and through witchcraft and sorcery worked to destroy the Suppliant so that he "brake his legge and faul was hert thurz the weche he was in despair of his lyff." The Defendant had openly and boldly announced that he would by "ye said craft of enchauntement and sorcerye wyrke your said suppliant his nekke to breke & hym endeles to destroye without your gracious Lord-

> ship eide and support." That "so moche as the comyn lawe may nouzt helpe" he prays for the writ of subpœna to compel the Defendant to appear before the Chancellor who is asked "hym to swere to forsake hys eresy and wecchecraft and redresse and reforme to a good lyf and moreover hym to punysse in amendement and correccion of hys soule." The Bill further prays that the Plaintiff "may have hys pies, with damag & expenc & that in the honor of God and in the way of cheryte."; a conclusion somewhat in the spirit of the Welsh miner, who, when first he strikes his pick into the earth declares it to be for "the glory of God and what he there may find."

From the time of Edward III to the reign of Charles II, the exercise of this jurisdiction was stubbornly, even bitterly, contested by Parliament and the Common Lawyers. In a very literal and real sense they sought to confine that jurisdiction to cases where there was "no remedy at Law." Many Acts of Parliament were passed, as in time of Henry VI, expressly limiting it to such cases. This view is clearly set out by Coke in his Chapter (VIII) on Chancery in the third volume of his "Institutes" (1629–1630). He distinguishes between the "Court of Chancery" and "Equity," the former being the Common Law Jurisdiction which at that time was extensive and important. The equity or extraordinary jurisdiction he limits to three subjects, "covin," "extremity," and "breach of confidence," or, as we would say now, "Fraud, Accident and Trusts," and even in these cases where there was no remedy by the ordinary Course of Law (citing the opinion of Lord Ch. J. Popham (1592–1603) in Sir Moyles Finche's Case.

The remedies applied included Injunction, Specific Performance, Cancellation, Account and Discovery, but up to the time of Lord Chancellor Nottingham the exercise of this jurisdiction was neither consistent nor systematic. This celebrated judge deserves the encomium passed upon him by Sir Pepper Arden, M.R., in Bridges Case (3 Vesey, 127), where he says of him, that "He was the Father of Equity,

almost, I may say, in this Court." He was made Lord Chancellor in 1675. Campbell, in his "Lives" (Vol. 3, p. 302), referring to Lord Nottingham, says that most of the judgments of his predecessors had been allowed to fall into oblivion, as more likely to mislead than guide; and no attempt had been made to classify or systematize those which had been preserved. It was Nottingham who made of equity a scientific system. His great object was to redeem it from the approbrium of being supposed to depend upon the individual opinion or caprice of the Lord Chancellor.

Indeed, such was the constant complaint and strongest weapon employed by the Common Lawyer in his argument against the exercise of the extraordinary powers of the Court of Chancery.

"Honesty, Equity and Conscience," says Spence, were the recognized principles controlling the decisions of the Chancellor. It was in commenting upon this that the learned Selden, a contemporary of Coke, in his "Table Talk" on Equity, said: "It is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure the Chancellor's foot. One has a long foot, another a short foot. It is the same thing with the Chancellor's conscience."

If such criticisms were directed against Equity principles, far worse strictures were passed upon Equity practice. During the reigns of James I and Charles I, the abuses of the Court had assumed portentious proportions. Equity "precedure" did not proceed. Causes frequently lasted from ten to twenty years. The pleadings and examinations were wonderfully prolix and expensive.

One extreme case has been cited, made famous by the nature of the penalty imposed by the Chancellor, in which a replication required nearly "six score sheets of paper" for its expression, *(Mylward v. Weldon,* 1596).

In a tract by William Clarke (1642), entitled a "Vindication of the Professors and the Profession of the Law," cited in Parke's History of Chancery, he complains that during this period "the abuse of equity is the foulest ulcer in all our legal grievances and but an *upstart of no antiquity.*"

Another writer, cited by the same authority, speaking of

the same period, says, "that under a pretense of Equity and a Court of Conscience our wrongs are trebled upon us. Law, though defective, has some certainty. Equity, under a pretense of conscience, devolves all cases upon Will."

Many similar expressions can be found advanced by the Champions of the Common Law against their ancient enemy, the Chancellor and though uttered during the heat of controversy, and overdrawn and exaggerated, yet contain a substantial element of truth.

> Such, in brief, was the system of Equity Jurisdiction prevailing in England at the time of its origin in Maryland — a condition which suggests the remark that when introduced here its growth was unfinished and that like the "lame and unfashionable Richard," it was sent into this New World before its time and "scarce half made up."

CHAPTER II.

EQUITY IN MARYLAND.

ITS INTRODUCTION.

The Charter granted by James I to Sir George Calvert as Lord Proprietary of Maryland, followed substantially the one granted to him in December, 1623, for the Province of "Avalon," in New Foundland. Before it had passed the Great Seal, Sir George died, and the patent issued in the name of his oldest son, Cecilius, on June 20, 1632.

Under this Charter, Maryland was practically a Principality, and among the Sovereign Powers vested thereby in the Lords Baltimore, were the right to establish Courts of Justice designate their jurisdiction and appoint their Judges.

By virtue of this power, Lord Baltimore issued a "Commission" to his brother, Leonard Calvert, dated in London on the 15th day of April, 1637, for "the Regulation, Government and Settlement of the Province." Under it he was given power "to hear and determine all civil causes, both *in Law* and *Equity*"— was constituted "*Chancellor,* Chief Justice and Chief Magistrate of the Province," and was further empowered "to grant commissions for the execution of Justice," the Document ending with the nomination of three gentlemen "to be of our Council" as advisors to the Governor.

This commission was the first authoritative source of Judicial Power and it was by this Act that Equity Jurisdiction was introduced into Maryland,— probably first among the American Colonies in which it was recognized and at a period forty years before the "Father of Equity" (Lord Nottingham) took his seat upon the Woolsack as Lord Chancellor of England.

We have noticed how, under this Commission, both Law and Equity Jurisdiction were vested in one person, who also had the authority to "grant commissions for the execution of Justice." Leonard Calvert, "Chief Justice and Chancellor,"

the depository of this power, proceeded to exercise it by establishing the Provincial and County Courts, thereby laying the foundation of our Judicial system.

As early as 1638 these Courts were in existence. In the Assembly which met in January of that year, we find among the proceedings, that the House adjourned until February 8th, "because the Court was to be held in the meantime,— that the privilege of Parliament should be void until the Court were passed," and further on that there was read for the third time and passed, an "Act for the punishment of certain crimes in the County Court."

These references to the "Court" and "County Court" were to existing institutions, but as there were no Acts of the Assembly in effect, providing for such Courts, it is to be presumed that they were established by the Lieutenant General under the exercise of the powers granted him by Lord Baltimore, in the Commission of 1637.

As a matter of fact none of the early Colonial Courts had a Legislative origin. Although "County Courts," with the complex machinery consequent upon trial by jury, and the High Court of the Province, the "Provincial Court" were in operation almost from the foundation of the Colony, nowhere can we find any specific Act which brings them into existence or defines their Jurisdiction.

The explanation of this condition no doubt lies in the fact that for the first six or seven years from the foundation of the Colony, the Assembly failed to pass any measures relative to Judicature *which became operative.* This was due to a conflict which arose between the Lord Proprietary and the Assembly as to which belonged the initiative in proposing Legislation and resulting in the first two or three Sessions in the rejection of all Laws proposed by Lord Baltimore, and in his veto upon all Laws originating with the Assemblies.

In the meantime the Courts established by the Governor under the powers vested in him by his Commission, were in operation and by the time the Assembly was in a position to enact measures that would receive the assent of the Lord Proprietary, their jurisdiction and forms of procedure had become established and rights had no doubt become vested under their decisions. The Assembly was then in a position

where it could do nothing else but confirm the Courts in the exercise of their powers.

Such appears to be the explanation why none of our early Colonial Courts, including the Court of Chancery, had any Legislative origin. But such a method of establishing our Judicial system was certainly not contemplated by the Colonists themselves. So much may be inferred from the Acts of Assembly of March, 1638. It is the second held in the Province of whose proceedings we have any record and enacted some notable legislation. It evolved a system of Administration and Judicature which would have placed the Government of the Colony upon a broad and firm foundation.

Four Acts were passed establishing a "Court of Admeralitie," "Pretorial Court," "County Court," and a "*Court of Chancery.*" At this time nothing will be said of the first two. The "County Court" was to have final jurisdiction in all appeals from inferior Courts and with original jurisdiction in all civil causes, similar to that exercised "by any of the King's Courts of Common Law in England." It was to be presided over by a "Chief Justice of the Province," and, unless provided otherwise, by the Laws of the Province, with the "same forms and procedure as is observed in the Courts of Common Law in England."

But of special interest to the student of equity jurisdiction, was the "Act for the erecting of a Court of Chancery." The Court was to have jurisdiction in "all matters and causes whatsoever determinable in the High Court of Chancery in England" and in "all civil causes not provided for by any law of this Province." The Court was to consist of the "Chancellor of the Province and Council of State for the time being," and a Clerk (or Recorder) appointed by the Chancellor. The Court was to issue the like writs and award the same judgments as in like causes was done by the High Court of Chancery in England.

In the administration of justice an improvement was sought upon the Court, after which it was patterned, for it was provided "that the most summary forms of proceedings and trial shall be used in this Court as the Chancellor shall approve or appoint."

This attempted establishment, side by side of Courts of

Common Law and Chancery, with the separate and distinct jurisdiction peculiar to the nature of each, failed to become laws by reason of the veto interposed by Lord Baltimore, their fate no doubt being involved in the quarrel then pending over the rights to initiate legislation which was mentioned above.

There is one phrase in this Act creating a Court of Chancery, which we will find in subsequent legislation relating to judicature. Its consideration here will render it more easily understood when we meet with it again. The Court was to have not only the same jurisdiction as that exercised by the High Court of Chancery in England, but in "all causes not provided for by any Law of the Province."

These words are not to be taken literally. At that time there were practically no "Laws of the Province" defining rights and obligations. To give these words their face value would operate to cast upon the "Chancery Court" not only equity powers, but jurisdiction in any case at Common Law, not provided for by law of the Province. This view would be inconsistent with the Act of the same Assembly, providing for a County Court with full Common Law Powers.

It is clear, therefore, that the phrase "not provided for by any law of the Province" really means and is equivalent to that expression which has been the ground of the Chancellor's jurisdiction —"no remedy at law."

To summarize this chapter we can say:—

That Equity Jurisdiction was introduced into Maryland under the Commission of April 15th, 1637, appointing Leonard Calvert Chancellor and Chief Justice and that by virtue of the power thereby vested in him, he established the Provincial and County Courts in which this Jurisdiction was exercised.

CHAPTER III.

THE EXERCISE OF EQUITY JURISDICTION, BY THE GENERAL ASSEMBLY. 1636-1662.

PART ONE.

ORGANIZATION AND PROCEDURE.

Nearly every student of our Colonial History is familiar with the case presented by the indictment, trial and execution of Thomas Smith, for Piracy in the Assembly of March, 1637. But how many are aware that the same body exercised an extensive Civil Jurisdiction? For we find the first Assembly of which we have any record, deciding cases at Common Law, both in contract and tort, and what is more relevant to the subject of this Chapter, giving Judgments in the nature of decrees in Equity and doing so, *as a Conscious Exercise of Chancery powers.*

When the house was acting in this capacity, it recognized its exercise of the judicial function by calling itself a Court, and so in almost every instance where a decision is given, we notice the expression " the Court ordered."

The Judgments in most cases were rendered in the form of " Orders," which were usually included and published among the Laws passed in the same Session. A similar method was adopted by the General Assembly of Massachusetts, which, in order to assure greater dispatch in such business, transacted the same by Orders or Resolutions, thus avoiding the solemnity and delay of passing Acts for such purposes. No doubt the same reason prevailed here.

The Assembly of March 1641–1642, provided additional procedure for the administration of Justice by referring the different " petitions " presented to a Committee, which would hear and determine the cause and report its Judgment therein to the

House, for approval or rejection. At first its power expired with the disposition of the particular case which had been referred to it, but later (by Act of Assembly 1642), it became a standing Committee, presided over by a Chairman, which met "at three o'clock every afternoon to consider of all Bills and of all Petitions and to make report to the House."

The Committee was invested with ample judicial authority, having the right to summon witnesses, administer oaths, imprison for contempt and "use any power necessary to the trying of any cause."

When the Assembly divided into two houses in 1650, the procedure by Committee was continued and the trial of causes still remained in its hands. In passing judgment upon the Committee's report each House would act independently upon the case and send its decision to the other branch for affirmance or rejection.

Twice during the period covered by this Chapter (1636–1662) there occur long intervals of time during which the records disclose no instance of the exercise of Judicial Power. First, from 1642 to 1647, during the troublous and turbulent times of the Civil War when conditions were scarcely favorable to the settlement of controversies by the calm methods of Judicial proceedings; and then again from 1650 to 1660, while the Province was under the authority of the Lord Protector Cromwell and when the Assembly met infrequently and irregularly.

Down to 1660 the records in the cases are very brief. The names of the parties are given, followed, without any intervening pleadings, by a statement of the subject of litigation and the disposition made of the cause — somewhat like a syllabus to a modern report.

PART TWO.

THE JURISDICTION.

The following cases have been selected to illustrate the exercise of Equity Powers by the Assembly, but in considering them the reader must bear in mind the undeveloped state of

Equity Jurisdiction at that period and if these examples seem vague and inconclusive, this defect must be attributed to such causes.

In the session of 1638–1639 occurs the case of *Cornwaleys vs. Morris*, the former being a famous litigant in early Colonial times. Judgment was given for the Plaintiff "for 200 pounds of tobacco for the next year's rent for the house." The Defendant was further required to surrender the house to the Plaintiff at the end of that year unless he could prove "before the next crop" that he had it for a four years' term rent free from a certain Captain Fleete.

> This Judgment partakes of all the characteristics of a decree in Equity. It first directs the Defendant to pay the Plaintiff a specific sum, then to do something else at a certain time in the future, unless before that time he shows cause to the contrary.

In the case of *John Medley vs. John Hallowes* (Assembly 1641–1642) the Committee reported that "upon examining the petition of the Plaintiff they considered" that the Defendant should deliver certain cattle to the Plaintiff before the end of the next May. The Plaintiff was in his turn required to pay the Defendant, before the 10th day of following November, 200 pounds of tobacco in lieu of not transporting them. Should the Defendant fail to deliver the cattle on the day limited, he was to forfeit 5,000 pounds of tobacco. It is to be noted that this judgment is to be carried out wholly *in the future and operates upon both parties.*

Following the order passed in the case just cited, and as an example of the conscious exercise of Equity Powers by the Assembly, is found the highly suggestive report of the Committee in the cause of *Hampton vs. Nicholls.*

> "Touching the petition of *Robert Nicholls vs. John Hampton* the Committee reported that they thought fit *to leave the Petitioner to the ordinary course of Law.*"

In the Assembly of 1647–1648 we find the case of *Nicholas Guythe vs. Captain Cornwaleys.* The petitioner was a Redemptioner who had by contract bound himself to service for a certain period. He petitioned "for his freedom." The House

found " no service due " by the Plaintiff but that the product of his labor during this period belonged to the Defendant. In order to ascertain the amount due, the Plaintiff was directed to bring in a just account under oath. It was allowed by the House in its entirety, which further " Ordered that each should give the other an acquittance from the beginning of the World to the Present Day."

> This case may be likened to a decree in Equity, cancelling an agreement, ordering an account to be stated under it, and directing each party to release the other upon its settlement — decidedly the flexible relief given by an Equity Court and not the hard unilateral judgment of a Court of Law.

Thorneborough's case (Assembly 1650) arose from his claim to a horse alleged to be a gift to him from Governor Leonard Calvert. It was in the possession of the Defendant, Fenwick, who had bought the animal from Mrs. Margaret Brent, the Executrix of the will of the Governor, who had since died. There had been no delivery of the horse to the Plaintiff by Calvert though there appeared to be some proof " upon Record " of the gift. Upon this state of facts, the Assembly ordered that the Defendant " Should not alien, sell or transport or cause to be transported out of this Province, the said horse " upon certain penalties " till it be determined at the next General Assembly to whom the said horse rightly belongs."

> This order was in effect an injunction to restrain the Defendant from disposing of the subject matter of the suit pending a final adjudication of the question of its ownership.

The records disclose no more cases relative to Equity Jurisdiction until the Assembly of 1662, twelve years since the decision of the case referred to in the preceding paragraph. By this time the Assembly had ceased to be a Court of first instance and its Judicial Powers were confined exclusively to the determination of Appeals. When and why this change was made the records fail to show, but it was probably due to the clearer perception beginning to prevail of the proper function of the Legislature. We must remember that the world knew

and cared very little for the doctrine of separation of powers before the time of Montesquieu.

The petitions at this period have the address and style of formal Bills in Equity. Take for example the "petition of Cuthbert Fenwick, et al., Guardians of Robert and Richard Fenwick." It is addressed "To the right Honorable, the Upper and Lower House of this Present General Assembly. The Humble Petition of Cuthbert Fenwick, et al. Humbly Sheweth" and it closes with the formula "And they as in duty bound, shall pray, etc."

One of the most striking cases is presented by the petition of Captain Thomas Cornwaleys. It is addressed

> "To the Honorable the Lieutenant General and *Chancellor* with the rest of the Councill assembled in the Upper House of Parliament and to the Gentlemen of the Assembly for the Province of Maryland. The humble petition and complaint sheweth:"

The Defendant was John Nicholls and the trouble arose over the right to the possession and to the labor of his daughter, a minor who had been indentured by articles in writing by Nicholls to Cornwaleys as a servant. Cornwaleys charged that Nicholls had filed a petition "to this Honorable Court, February 11 1661," alleging that Cornwaleys was not treating his daughter in accordance with the terms of the indenture, but being conscious that the facts alleged were false, he "waived the judgment of this Honorable Bench to whom it solely and properly belonged to take cognizance of what is law or *Equity* and crave a Jury to whom by the Laws of England and Maryland it belongs to take cognizance only of matter of fact;" the presumption being that the questions arising under the indenture were matters of law, the indenture itself being proven or confessed.

> "In consideration of all which premises with the illegality of the verdict wherein this Complainant without ever being heard or any witness in his behalf examined is aspersed upon Record with *fraud* and *deceit*, which he abhors and is in his *conscience altogether innocent.*"
>
> "That to this Honorable Court it belongs in

> Parliament or Chancery by the Laws and Customs of England and this Province to relieve the injured against *surreptitious* judgments, nothing being more common in this Nation than reversing of judgments upon writs of error in the Equity or legality of the Proceedings." The Prayer was that the "verdict may be vacated and the order thereupon reversed whereby your Petitioner may have his reputation vindicated and the Servant or satisfaction for her time, restored to the Right Owner."

The House upon this petition ordered that errors be assigned and further on we find that a *scire facias* was issued against Nicholls to come to the Assembly "*ad audiendum errores*" as signed by Thomas Nolley, Esq., Attorney for Cornwaleys, "to show cause if any he have."

Nicholls appeared and was served with a copy of the errors already assigned and was directed to answer in five days. He failed to do so, whereupon Nolley, Attorney, made a motion for judgment upon the errors assigned by him, and the House declared "that the errors were such that the case ought to be tried again at the Provincial Court sitting as a *Court of Chancery* on December 8th next." In the former trial it will be remembered that it was tried as a Common Law case by a Jury.

The last case that will be referred to, throws a strong light upon the condition of Equity Jurisdiction in the Colony. It presented some searching questions as to the nature of our then Court of Chancery and the power and position of the Chancellor. It arose upon an appeal from a decision of the Provincial Court sitting as a Court of Chancery, held February, 1662.

Marmaduke Snow filed his petition framed in the same form as the others heretofore set out with the exception that it was addressed solely to the Governor of the Province, an immaterial fact inasmuch as it was presented to the Assembly for action. The Plaintiff recited a recognizance from Thomas Gerard to Abel Snow, a brother, whereby Gerard bound himself to pay Abel the sum of one thousand pounds sterling. The recognizance was assigned to the Plaintiff, both the recognizance and assignment being matters of record.

The petition stated that the Complainant instituted his suit in the *Honorable Court of Chancery* of this Province and brought a writ of *scire facias* against Gerard by which he was commanded to show cause why he should not pay the money claimed to be due. That by false suggestion and bare averments Gerard had procured the dismissal of the case "to the irreparable damage of your petitioner and contrary to all Equity." He prayed for leave to assign errors in the proceedings of said Court and "that in this Honorable Assembly you will do him right according to the merits and justice of this cause." Upon this petition it was ordered "Fiat Justicia Charles Calvert."

The Plaintiff assigned errors as follows:

1. "That a Recognizance in Chancery is a Record of the highest and most Honorable Court of this Province to be discharged but upon some record of the same Court, yet the Plaintiff's Bill was dismissed upon the bare averment of a few witnesses."

2. "In the Court of Chancery the Chancellor being the Chief and only Judge according to the Laws and Customs of England, the Plaintiff's Bill was notwithstanding dismissed, contrary to the opinion of the Chancellor." The third ground of error was alleged to arise from a Fraud practiced upon the Court.

Thereupon the writ "audiendum errores" was granted and issued against Gerard and returned by the Sheriff and endorsed "Executed." The usual proceedings were had upon this petition and assignment of errors. The case came on and both parties appeared. Gerard answered the errors as follows:

1. He denied that there was ever any Recognizance of his giving in any Court of Chancery in the Province relating to Snow.

2. He denied "That the Honorable Chancellor now being was at the time of the dismissal of the Bill, Chief Judge of the Court of Chancery since he never was by authority proclaimed as Chief Judge of the Chancery Court or reputed or ever admitted so to be nor did he ever assume

> the place or power of the Chief Judge of that Court. But that the Lieutenant General that now is, hath from time to time by virtue of his commission, he supposeth, sat as Judge of that Court."

The Defendant further argued that as the Lieutenant General sat in the Court he could not be inferior to the Chancellor since the Lieutenant General represented the Lord Proprietor himself who was sovereign, otherwise if the Chancellor was the head of the Court we would have a subject taking precedence of his Sovereign, which would be "strange and incongruous both to Lawe and Reason." That the Chancellor was not constituted in this Province according to the full and ample authority of the Laws and Customs of England, but by virtue of a commission from the Lord Proprietor, and so had no such ample authority as was supposed. "For that the Lieutenant General doth to this day sit in that Court as Chief Judge and all addresses are made to him and his Councill, and such was in Snow's case." The Defendant concluded his "Answere" by craving the Judgment of the Assembly and asked "to be dismissed with his reasonable cost."

The Assembly in giving its opinion decided that the first error was not rightly laid, being contrary to the facts as "the Court (below) did give judgment upon view of the Records." but that the third error was rightly laid and therefore sustained it.

Unfortunately the really important question raised by the second error and the answer thereto, was not decided, it apparently being waived in the argument as appears from the language of the Court. "Then was taken into consideration the second error (vizt.), the power of the Chancellor, and waived." But it is clear from what has previously appeared, that the contention of the Defendant as to this point was correct, and that the Plaintiff's second error was not rightly laid.

We have seen that there was no Court of Chancery presided over by a Chancellor in the Province, but that Equity Jurisdiction was exercised in the Assembly and in the Provincial Court the latter consisting of the *Governor*, Chancellor and *Members of the Council, as Judges.*

Moreover we have seen that in no instance where the Chan-

cellor did act, was it without the association of the members of the Councill.

In fact, the Court of Chancery which was sought to be established by the Assembly of 1638–1639 at the very settlement of the Province, was not to be patterned in this respect upon its English Model, but was to consist of the Chancellor and *Members of the Council* of State as Judges.

We have now reached a period where we can appropriately terminate our investigation into this branch of our subject. Beginning with the case of *Fenwick, et al., vs. Thomas Taylor*, in the Assembly of April, 1662, original jurisdiction of the Assembly ceases, and from this time on all the cases are appeals from the Provincial Court.

This Chapter may be summarized as follows:

> At first we find the Assembly exercising Equity Jurisdiction in original cases. Later we find it exercising both original and Appellate Jurisdiction, and finally, at the period with which this Chapter closes, the Jurisdiction of the Assembly is confined exclusively to Appeals.

CHAPTER IV.

EQUITY AND THE ASSEMBLY.

The design of this Chapter is to trace the development of Equity Jurisdiction by Legislative Action, an investigation which is somewhat surprising in view of the meagre results obtained.

For a period of eighty years (1634–1715) we find but few Acts which in any way relate to our subject. None of the earlier legislation contains a direct unequivocal reference to the Chancellor, or Court of Chancery, by name, notwithstanding the fact that an extensive Equity Jurisdiction was being exercised.

Though the Colony was founded in 1634, it was not until the Assembly of July, 1642, that any measures were enacted clearly relating to our early system of Jurisprudence. Then for the first time we meet with two acts which through subsequent re-enactments form the foundation upon which Justice was administered for a number of years. The one, entitled "An Act for Rule of Judicature," related to Jurisdiction; the other, entitled "An Act for Judges," related to the Courts in which that Jurisdiction was to be vested.

The first declared that:

> "Right and Just in all Civil causes shall be determined by law or custom of the Province or former precedents to be determined by the Judge *or in the defect of such* according to *Equity* and *Good Conscience.*"

It is evident that this act relates in part to Equity Jurisdiction, as will clearly appear from the import of the words italicized. "Defect of law or custom" is but a paraphrase of "no remedy at Law," the basis of the Chancellor's Jurisdiction, while the words "Equity and Good Conscience" as used by the Law writers of that period had peculiar significance; they relate exclusively to the "extraordinary" Jurisdiction of the Court of Chancery.

The "Act for Judges" passed by the same Assembly provided:

> "The Judges in all causes shall be appointed by Commission from the Lord Proprietary — provided that in all causes matters and questions for which no certain rule of determination is provided by any Law of the Province, but left to the *discretion* or committed to the *Equity* or *Good Conscience* of the Judge; judgment shall be by the Lieutenant General and Council of the Province then present in Court or the major part of them (if it be in the Provincial Court), or — by the Commissioners of the County or the major part of them if it be in the County Court."

This Act may be regarded as a provision for the exercise of the Equity Jurisdiction recognized in the "Act relating to Judicature." There can be no doubt but that such is its meaning. The words, discretion, equity and Good Conscience, were at that period distinctive badges of the Chancellor's Jurisdiction.

As was previously observed, it was by virtue of these acts that Justice was administered for a long period in the early history of the Province. As they expired from time to time in accordance with the custom by which the duration of all Legislation was self limited, they were re-enacted with but slight verbal changes, and it is not until 1715 that we meet with any other Act directly relating to the Court of Chancery. It is highly probable that these two measures were intended to operate so that every exercise of Judicial Power should no longer derive its authority from the "Commission" of April, 1637, but from the Law of the Province. Common Law and Equity Jurisdiction now have their source and authority by virtue of these Laws, the latter system to be exercised in the Provincial Court by the Lieutenant General and Council and in the County Court by the Commander and Commissioners of the County.

By reason of the troublous times resulting from Claibourne's Rebellion no Assembly met in the Province until the convocation at St. Inigoes, December, 1646–January, 1647. A striking feature of the Journal of this Assembly is the fact that it is endorsed "In the Upper House," whereas the Legislature of Maryland did not sit as two Houses until the year 1650. An

"Act Touching Judicature" was passed which in a measure combined the essential features of the "Act for Judges." It declared that "all justice shall be administered by the Governor or other (chief) Judge in Court according to the law of the Province, and in *defect of Laws* then according to the *sound discretion* of said Governor or (chief) Judge and such of the Council as shall be present, or the major part of them." The distinction between Law and Equity is still maintained, and we find as in all cases where the Lieutenant Governor was to exercise equity powers, the members of the Council were to be joined with him.

The next Assembly, which met in St. Mary's in April, 1649, is important, as it passed the first law in Maryland in which any reference is made to the Chancellor as such. It was an Act to punish counterfeiting the Great Seal of the Province, various penalties for the offense being provided, including death, maiming and the confiscation of property, and any one or more of these were to be inflicted "as the Governor and *Chancellor* and Counsell of the Province, or any three of them, whereof the said Governor or Chancellor are to be one, shall think fit."

Outside of the Commission of the Lord Proprietary of 1637, in which Leonard Calvert was appointed Chancellor, this is the first official acknowledgment of the existence of this officer. It is highly probable that he is mentioned here by reason of the fact that as Chancellor he was keeper of the Great Seal rather than in his judicial capacity. It is also to be again noted that in any action by the Chancellor the Councill participates. This relation between the Chancellor's powers and their exercise in connection with the Councill became the chief bone of contention in a celebrated case before the Assembly, which will be discussed in another Chapter.

During the time Cromwell governed England as Lord Protector, his authority was paramount in the Province, as appears from the fact that Laws were enacted and all writs ran in his name. No acts of importance relating to our subject were passed by the Assembly during his rule, and it is to be presumed that no material change was made in the organization or jurisdiction of the Courts. The Assembly of 1654 especially provided that all "suits, actions and trials that had de-

pendance in any Court of Judicature in the Province" before its "reducement" to the authority of the Commonwealth, should remain in full force and effect.

Lord Baltimore regained possession of his Province in 1658, but it is not until the Assembly of May, 1674, that we again meet with any legislation germane to this Chapter. It passed an "Act to reform Attorneys, Councillors and Solicitors," a somewhat misleading title, as what was attempted was not a reformation of the morals of our early professional brethren but of their charges. It related to Practitioners in the Provincial Court, *Chancery Court* and other Courts of Record and limited the charge for prosecuting a suit in the Chancery Court to 800 pounds of tobacco, equivalent to about 20 dollars.

This Act is notable for two reasons; as it is the first direct reference to a "Court of Chancery" by name in the Records of Acts of Assembly, and, again, it refers to the Chancery Court as a tribunal separate from the Provincial Court, the significance of which will more fully appear in the Chapter relating to the Court of Chancery.

Another Act, more interesting than important, was passed by Assembly May–June, 1676. It fixed the fees allowed various officials for the performance of their duties, and among others included the following:

To the Chancellor—	Pounds Sterling.	Tobacco.
For the seale to a decree in Chancery....	2	480
" " " " every Injunction	1	240

In the Assembly of June and July, 1699, was passed the celebrated Act "for Appeals and Regulating Writs of Error." Among other provisions it allowed an appeal "to all such persons as conceive themselves Grieved by any *decree in Chancery,*" to the Governor and Council. If the amount involved exceeded 300 pounds sterling an appeal was allowed from such Judgment of the Governor and Council to the King in Council.

The Assembly of 1704 passed an Act known as Chapter 31. It was entitled "An Act for the better administration of Justice in the *High Court of Chancery,* Provincial and County Courts." It contains the first reference among the Proceedings of the

Assembly to the High Court of Chancery by that name. The body of the Act is not given.

The last Act to be considered in this Chapter is the one which in all digests of our early Statutes is set out as being the first in point of time relating to the Court of Chancery.

Chapter XLI of the Acts of 1715 is entitled "An Act for the better administration of Justice in the High Court of Chancery, Provincial and County Courts of this Province." Section VII thereof reads as follows:

> "That His Majesty's High Court of Chancery within this Province shall not hear, try, determine or give Relief in any Cause, Matter or Thing, wherein the original Debt or Damages doth not amount to Twelve Hundred and one Pounds of Tobacco, or Five Pounds and one Penny in Money."

The language of this Act is so plain that no comments are necessary to show the propriety of its appearance in this Chapter. It brings us down to within four years of the period when the Court of Chancery was given the organization it maintained until abolished by the Constitution of 1851 and when subsequent Acts of the Legislature became frequent and certain in their relation to Equity Jurisdiction.

SUMMARY.

During a period of eighty-one years, 1634–1715, we have found but eight Acts of the Assembly which in even the remotest manner relate to Equity Jurisdiction. Of these the Acts of 1649 and 1704 deserve mention solely because the first contains the word "Chancellor" and the latter, the expression "High Court of Chancery" in its title. The Acts of 1674 and 1676 are hardly of more significance. One relates to the fees of practitioners in the Court of Chancery and the other to the fees of the Chancellor.

This leaves but four measures the enactment of which may be regarded as of real importance. First in point of time are the Acts of 1642 concerning "Judges" and "Judicature" which es-

tablished the Judicial system of the Province, and the Act of 1646 which embraced the essential features of the Acts of 1642.

Then after an interval of fifty-three years we find the Act of 1699 providing for Appeals from Decrees in Chancery to the Governor and Council and thence to the King in Council, followed sixteen years later by the Act of 1715, relating to the Jurisdiction of the Court of Chancery.

CHAPTER V.

THE COURT OF CHANCERY.

PART ONE.

ORIGIN AND DEVELOPMENT.

The Court of Appeals of Maryland, as stated in a recent address by its distinguished Chief Justice, can lay claim to being the oldest Court of Common Law in existence in the English speaking world. This assertion derives its force from the fact that the Court traces its origin to and is a development from the first Court of the Province.

But for the same reason it may boast a wider distinction; it can wear "the blended wreath and the double crown" of primacy as the most ancient Court of Equity as well as Common Law of our Anglo-Saxon race. For the Provincial Court, the head and front of both claims was a Court of Equity as well as a Court of Common Law.

It is certain from the earliest times this Court exercised a full and complete Equity Jurisdiction. The evidence of that fact will appear in the succeeding chapter.

Beginning with the year 1637 and for a number of years thereafter (to 1661) the Court exercised this Power solely under the style and title of "Provincial Court." There is nothing among the Records to indicate that it was sitting as a Court of Chancery save the nature of the cause presented for adjudication and the kind of relief offered. The Court is characterized in its Proceedings as "A Provincial Court held at St. Mary's" on a given date.

During this period (1637–1661) it was composed of the members of the Council and presided over by the Governor, who was also "Chancellor," but there is nothing to indicate whether he was sitting in the latter or in both capacities.

In 1661 the offices of Chancellor and Governor became separated, coincident with which a change occurs in the style of the

Court. The Proceedings now read "At a Court held for the Chancery and Provincial Court."

As may be inferred from its title the Court acted in a dual capacity as Equity Court *and* Common Law Court. For example, "At a Court held for the Chancery and Provincial on Tuesday February 24 1671," there were present the Chancellor and associate justices. The proceedings clearly indicate that the Court disposed of cases in both jurisdictions at the same sittings.

This double style continues with but one exception till the year 1677. This exception is disclosed by the following entry among the Proceedings: "At a Court held at St. Mary's for the *High Court* of *Chancery* for the Province of Md." June 1 1669.

This conception of the high nature and dignity of the Court was too advanced for the times, for in the next entry the old style of "Chancery and Provincial Court" is resumed.

By 1677 the Court of Chancery has emerged from the Provincial Court with clear and definite outlines as an independent tribunal. Under date of December 9 1677, occurs the following entry:

"At a Court of Chancery held at St. Mary's."

This style continues uninterruptedly until 1693, when a more high sounding title is adopted. Under date of August 23 1693, the following entry is found: "At their Magistees High Court of Chancery held for the Province of Maryland at the City of St. Mary's." The more simple style is resumed in 1714 and continues till 1719, when the Court is called alternately the "Court of Chancery" or the "High Court of Chancery," apparently according to the taste of the person using the phrase.

PART TWO.

CONSTITUTION OF THE COURT.

An investigation of the Constitution of the Court results in some interesting information. A curious condition prevailed both in relation to the presiding Judge as well as the associate Justices.

Down to 1661 the Court was presided over by the Governor, who was also Chancellor. After the two offices were separated both officials frequently presided, though when the Governor was present he took precedence over the Chancellor. The Proceedings would always give the personnel of the bench, usually beginning with "The Honorable the Chancellor," followed by the names of the Justices.

At a Court held on December 13 1670, we find the Governor presiding as Chief Judge in Equity, with the Chancellor also sitting as next in order. The Proceedings read "Present: The Right Honorable Charles Calvert, Esq., Lieutenant Governor and Chief Judge in Equity;" and again, in December, 1677, we note that the Honorable Thomas Nolley, Esq., presides as "Chief Judge in Equity."

In 1693 this title is used in preference to that of Chancellor and continues until 1709, when the title of the presiding Judge changes to that of "President." This title of President is continued until 1714, when the "Chancellor" again presides which is the style and title continued in the person of Wm. Holland, who on the 11th day of April, 1720, for the first time sits as sole Judge in Equity. Under that date the following entry appears in the Proceedings: "At a Chancery Court held at the City of Annapolis for the Province of Maryland on Monday, the 11th day of April, 1720. Present: The Honorable Wm. Holland, Esq., Chancellor."

As a matter of interest it may be stated that once during this period the Court was presided over by no less a personage than Lord Baltimore, himself.

"At a Court of Chancery held at the City of St. Mary's, May 27 1678," there was present:

"The Right Honorable Charles, Absolute Lord and Proprietary of the Province of Maryland and Avalon, Lord Baron of Baltimore."

In the matter of Associate Justices still greater variety may be found. As a rule there were usually four "members of the Council" present, but at first without any other style or appellation.

In 1669 they began to be called "Justices." For instance, among the Proceedings of the Court of December 14, 1669, is found the following entry: "This day the Honorable Wm.

Calvert, Esq., was sworn one of the Justices of the Provincial Court and Chancery, being next in Commission to the Honorable the Chancellor, and took his seat accordingly."

There seemed to be no rule as to the number of Justices that could sit. Down to 1682, four were required to be present to constitute a quorum. But their number varied; in some instances eight were present, and upon the occasion when Thomas Nolley presided as Chief Judge in Equity, there were ten Justices present in addition to the Chancellor.

In 1715 the title of Justices is changed to that of "Assistants," which latter appellation continued until William Holland sat as sole Judge in 1720.

From its foundation in 1637 until the year 1695 the Provincial Court and the Court of Chancery as well held their sittings at the "City of St. Mary's." In the latter year, under date of May 23, 1695, the following entry is found among the Records: "At Their Magisties High Court of Chancery held at the *Port of Annapolis* in the County of St. Mary's."

Exactly why and when this change of location was made does not appear. The first reference to it among the Acts of Assembly occurs in Chapter VI of the Acts of 1697. In directing to what use the several rooms in the new State House should be put, the Act states that of "the two rooms on the left hand, one of them shall be for the keeping of the Records of the Court of Chancery," and further directed the Honorable Henry Fowler, Esq., Chancellor, to place the records of his Court in that room.

By Act of Assembly, 1699, Chapter XIX, entitled "An Act for settling Assemblies and Provincial Courts at the Port of Annapolis, in Anne Arundel County," it was provided that "All writs, pleas and process, issuing or that has issued out and returnable to the Provincial Court or to the *Court of Chancery* shall be made returnable to the Port of Annapolis."

From 1695 to 1851, over a century and a half, the Court of Chancery sat at Annapolis, until abolished by the Constitution adopted in the latter year.

The development of the Court of Chancery may be summarily traced as follows:

Provincial Court, 1638–1661.
Chancery and Provincial Court, 1661–1677.
Court of Chancery, 1677 to 1693.
High Court of Chancery, 1693 to 1851.

PRESIDING JUDGE.

Governor and Chancellor, 1638–1661.
Chancellor, 1661–1693.
Chief Judge in Equity, 1693–1707.
President, 1707–1714.
Chancellor, 1714–1851.

ASSOCIATE JUSTICES.

Member of Council, 1638–1669.
Justices, 1669–1715.
Assistants, 1715–1719.

LOCATION.

At St. Mary's, 1638–1695.
Port of Annapolis, 1695 to 1851.

CHAPTER VI.

EQUITY IN THE PROVINCIAL COURT. 1638-1650.

The object of this Chapter is to illustrate the exercise of Equity Jurisdiction by the Provincial Court before the period when the Court of Chancery had begun to emerge from it as an independent tribunal.

It supports the assertion made in a previous Chapter that from its organization this Court acted as a Court of Chancery as well as a Court of Common Law and discloses the main ground for claiming the primacy for Maryland as the Colony in which Equity was first recognized as a system of Jurisprudence distinct from the Common Law.

It must be admitted that but few of the numerous cases appearing among its early proceedings relate to "Equity Powers." From the organization of the Court, about 1637 until 1650, certainly not more than twenty-five cases appear which would now be recognized as proper subjects for the Chancellor's Jurisdiction.

The proceedings bear but slight analogy to those of the present day. In the early years the Bill of Complaint called the "Petition" sets out the Complainant's case, and without any intermediate pleadings, such as answers, pleas, etc., is followed abruptly by the decision of the Court expressed by way of an "Order." In one or two of the later cases the gist of the testimony is set out as given by the various witnesses *viva voce* and a growing disposition to use depositions also appears.

The cases display considerable variety in the cause of action and in the relief decreed. The records disclose several instances of the following equitable remedies:

Orders to perpetuate testimony, writ of "ne exeat," injunctions to stay proceedings at law, discovery and account, and administration of estates of insolvent decedents. In one case we find the Court giving relief against a judgment at Law

obtained through fraud, an exercise of Equity power, which had awakened the bitter hostility of the Common Law Judges. In several cases decrees were passed for the surrender and cancellation of Bonds and other evidences of indebtedness, while in another we have the appointment of what is strikingly similar to a Receiver *pendente lite*. The following cases, selected as typical, are set out in detail.

The earliest Equity proceeding found among the records is a "petition" of Captain Cornwaleys, filed in August, 1638. Cornwaleys was the administrator of the estate of Jerome Hawley and was a creditor of the deceased to the extent of four hundred pounds sterling. In order to preserve the proof of his claim, he "prayed that his witnesses be admitted and examined *ad ppetuam rei memoream*," whereupon a "copie of a deposition" is filed, signed by the witnesses and sworn to before "John Lewger, Secretary," proving the debt and its assignment for full value to Cornwaleys.

Cornwaleys's administrator discharged and paid this debt to Conwaleys's creditor, and in so doing consumed nearly the entire estate, to the dissatisfaction of other creditors of the deceased. A number of suits were instituted by them against the estate, and, no doubt, for the purpose of providing himself with the evidence to meet them, he obtained a certified copy of the list of judgment creditors and the disposition made by him of their claims.

Among other things this copy stated, "We do further certifie out of the Records of our *Court of Chancery*, that upon a petition exhibited unto the Court before our Lieutenant General and Counsell," Robert Garrett "by the *decree* of our said Court recovered 1,000 lbs. of tobacco against the same Thomas Cornwaleys's Administrator aforesaid. Given at St. Marie's, Jany. 31, 1639."

This proceeding is rendered memorable as it is the first and sole instance of any mention of a Court of Chancery to be found among the Records of the Provincial Court during this period, 1637–1650: and the circumstance is doubly interesting since there is some ground for believing that the "Court of Chancery" before which the "petition was exhibited" and which passed the "decree" (note the technical terms) was

that Court of Chancery established by the Act of Assembly of 1638.

It will be recalled that the Act creating this Court received the assent of the Lieutenant General, but was repudiated by the Lord Proprietary, and considering the length of time required to dispatch the Act to Lord Baltimore for his assent or rejection and its return to the Province, it is not improbable that during this interval the Court was in session.

The Colonists could have no reason to suppose, in the light of the real cause for its rejection, but that the Act would receive the approval of the Lord Proprietary, and it is altogether possible, considering the urgent need for such tribunals, that, regarding the Court as authoritatively established, it began at once upon the administration of its duties.

The next case of any interest is set out in the petition of Leonard Calvert, filed in November, 1642. The Petitioner states that he has paid Thomas Stegg of Virginia 5,000 lbs. of tobacco upon his Bill of hand, but that the same had not been surrendered; that furthermore upon an account between them, 1,600 lbs. is due him from Stegg. He prays that Richard Thompson, the Attorney of Stegg in this Province, "may be enjoined to stopp in his hands" a sufficient part of Stegg's estate to pay the Proprietor's debt "afore the said estate be removed out of the Province and to deliver in the said Bill of 5,000 lbs. which is already satisfied." The Court ordered Thompson, the Attorney of Stegg, to retain sufficient assets in his hands to pay the claim of 1,600 lbs., and further "enioines" him to deliver up the said bill of 5,000 lbs. "or else to be at Court — to show cause why you refuse so to do and in the meantime not to deliver the bill out of your hands."

In the following instances the Court issued the writ of "Ne Exeat Regno." In the case of *Lewger vs. Todd*, filed 1643, the petition states that the plaintiff released the defendant from service upon his agreement to pay 50 dressed beavers a year for the following three years. It further states that there is a "vehement suspicion" that Todd will leave the Colony and "defeate the petitioner of the benefit of his said bargain," wherefore he humbly prayed that the defendant be arrested and held until he should give security not to leave the Province

until he had satisfied the petitioner's claim. Upon this petition a warrant issued to the Sheriff for Todd's arrest.

While not bearing the same well defined ear-mark of the application of this writ as the case now about to be cited, there can be little doubt but that the Court was exercising the Equity jurisdiction resorted to, to protect a plaintiff whose demands the defendant was avoiding by quitting the kingdom.

The case of Ralph Beaver against Wills Stiles during the same year leaves no room for doubt. The petition stated that the defendant, who was indebted to the plaintiff by Bill due November next, was about to depart the Province before the said Bill matured, " much to the loss and damage of the said Ralph, in case some speedy cause be not taken for his relief." He, therefore, prayed that the Sheriff should take Stiles in custody until he should undertake to satisfy the plaintiff's demands before leaving the Province. Whereupon the Court ordered " Warrant to Sheriff, Ne Exeat Provin. ret. November Ct."

The Power of a Court of Equity to relieve against vaxatious litigation arising from a " multiplicity of suits " is illustrated by the case of *Giles Brent vs. Cuthbert Fenwick,* filed June 13 1648. The plaintiff "complayneth for unjust molestation" that the defendant had entered an action against him in a foreign Court to recover 2,500 lbs. of tobacco due the estate of James Cawther, of which the defendant was administrator; that the claim was already in litigation before this Court, whose award he stood ready to pay, wherefore he prayed that Fenwick might be ordered to accept the sum adjudged to be due by the Court " and to give him a release from the said vexatious claim." The order of the Court was, that the sheriff should take the defendant into custody until he gave security to abide by the ward of the Provincial Court.

The case of *Commins vs. Brooks,* filed in December, 1648, represents an attempt to obtain relief against a judgment obtained through fraud. The " Complaint " stated that Brooks had obtained a judgment against Commins on an account at a previous session of the Provincial Court held on Kent Island. " But since that time the Complainant is able to make proof that the said Brooks hath taken a false and rash oath, in part of said account and (he, the complainant) desyreth to be relieved therein against the said Brooks by order from the Court."

Upon this petition a warrant issued to the Sheriff with the usual directions as to its return. No further action appears to have been taken.

An order bearing a very close analogy to one appointing a receiver "*pendente lite*" is found in Thomas Copley's case. The application is technically in good form, is made "upon motion" and contains the jurisdictional allegation as to loss, etc. It states that a difference is depending between the plaintiff and the Lord Proprietor concerning a certain tenement and as a result "to the loss of both parties the rents remain unpaid to either." He prayed that he may be authorized to collect the rents until a final determination to the contrary. The Court granted the relief, with the further order that the plaintiff pay over the rents if the case be decided adversely to him.

The next case, that of Anthony Rawlins, against John Sturman, in December 1648, presents the first instance in which the proceedings are expressed in formal language. The petition is addressed as follows:

"To the Worll Tho. Greene, Esq. Gov. etc.

The humble Petn of Anthony Rawlins:

Sheweth —"

That he gave to Sturman his note amounting to 475 pounds of tobacco for a "heighfer." That this heifer was taken from him and delivered to Giles Brent under an order of this Court which stipulated that Brent should hold the heifer until Sturman should prove his ownership of it, whereupon,

"Hee humbly craveth that he may not be sued nor impleaded for the said Bill unless the said heighfer be assured unto your Petn.

"And he shall evr. pray &c."

This is a clear instance of the well known equitable remedy by an injunction to restrain a suit upon a negotiable instrument.

The following case illustrates the power of a Court of Equity to grant relief by "Cancellation."

In February 1649 Thomas Sturman filed his bill against William Freeman. It alleged that the plaintiff was indebted to the defendant for 700 weight of best Virginia tobacco. To secure the payment of this sum, he had entered into a bond under the penalty of 25 pounds sterling, to Freeman. The

indebtedness not being liquidated at maturity, Freeman authorized a certain Richard Husbands to act for him as Attorney, with full power to collect the tobacco or bring suit upon the bond.

The plaintiff Sturman alleged that he had settled with Husbands for the 700 pounds of tobacco who had agreed to deliver up the bond for cancellation. But the defendant "contrary to his agreement and *all equity and good conscience*" refused to deliver the Bond and was about to depart the Province. The case was tried in open Court, both parties and their witnesses being heard. Defendant denied that he had agreed to accept 700 pounds in full discharge of said bond, but admitted its receipt. The Court found for the plaintiff and

"Ordered that the said bond be vacated and that the defendant shall deliver up the same to the plaintiff to be cancelled."

This Chapter will close with the case of Bennett against Brown, filed in 1650, illustrating the equitable doctrine of Specific Performance.

The plaintiff in his petition stated that he had bought of the Defendant a plantation in Mr. Gerard's Manor, for which he gave the defendant a cow, and his Bill for 300 pounds of tobacco. The defendant engaged to deliver to the plaintiff a lease of the plantation free from all arrears of rent, which up to this time he had failed to do, and Mr. Gerard had forbidden the plaintiff to enter unless he should discharge the arrearages of rent.

Wherefore, the plaintiff being much "damnified" prayed, "That the defendant may be compelled to perform his bargain or else to deliver up to him (the plaintiff) the said bill."

The Court ordered the defendant to perform his contract on or before the 25th day of the month, or in default thereof by that time, to deliver to the plaintiff his bill for the purchase of the plantation, and cancel the agreement.

CHAPTER VII.

EQUITY IN THE COUNTY COURTS.

One of the most obscure periods of our early Legal History is suggested by the title of this Chapter.

Did the County Courts exercise Equity Jurisdiction during the period covered by this paper?

This question will never be satisfactorily answered unless some of the early County Court Records prove to be in existence. However there are strong grounds for believing that these Courts were vested in a manner with Chancery Powers. It is not asserted that they exercised a two fold jurisdiction and that these Judges sat in a dual capacity as is now the case with our County Courts. But the view is here advanced, that these Courts applied Equitable Principles to the decision of causes warranting such application as a conscious exercise of Equity Powers, and by virtue of the sanction of the Legislature.

The Authority for such statements is to be found in several Acts of Assembly to which we will now direct our attention.

In the "Act for Judges" passed in 1642 and set out at length in a previous Chapter of this paper, we find it provided that in all causes left to the discretion or committed to the *Equity* or *Good Conscience* of the Judge; "the Judge shall be ——— the Lieutenant General or the Commander or Commissioners of the County then present in Court or the major part of them (*if it be in the County Court*)."

In a former Chapter, we pointed out that this Act clearly related to Equity Jurisdiction; it is equally clear that it applies to the County Courts as well as the Provincial Court and stipulates who the Judges are to be when cases are to be decided according to the principles of *Equity and Good Conscience.*

In this same Assembly (1642) appears another Act which by successive re-enactments is continued in force for nearly

twenty years. It is entitled "An Act appointing Court Days" and designates certain days to be Court days "in the Courts of St. Mary's — and in every other County." It is evident that this Act related to the County Courts and could not relate to the Provincial Court. It refers to Courts (in the plural) and the words "in every other County" excludes the idea that it might include the Provincial Court, which sat in one place. Nothing in this Act indicates any exercise of Equity Powers but when re-enacted by the Assembly of January, March 1647–1648 its bearing upon the subject of this Chapter becomes more evident.

This latter Act is entitled "An Act touching Court Days" and after designating the days on which Courts were to be held in the various Counties, provided that the "Judges authorized by Commission — shall judge all Causes within theire Cognizance according to the laudable Customs of this Province and according to *Equity* and *Good Conscience* — and where the Plaintiff or Defendant shall soe require it, the cause shall be tryed by a Jury."

In commenting upon this Act, it is to be noted that it relates solely to the County Courts, that it recognizes the exercise of Equity Jurisdiction by these ourts and allows a trial by Jury. It is not contended that the Court in such cases sat as a Court of Chancery. The provision for a Jury trial is repugnant to the idea of a tribunal with distinct Chancery powers. But it is certain that under this Act the judge was to apply in his decisions a fusion of legal and equitable principles; no doubt the whole purpose of the Act being to soften the rigors of the Common Law by an admixture of Equity.

Such was the expressed object of the next Act in point of time vesting Equity Powers in the County Courts. The act of 1647–1648 after several re-enactments was finally repealed by Chapter 2 of the Acts of 1676. There occurs a long interval during which the County Courts were confined to their Common Law Jurisdiction followed at length by Act of Assembly of 1723, found on page 242 of Parks Laws of Maryland.

The Preamble recites that "Whereas several judgments have been rendered in the County Courts according to the Strict rules of Law, and against Equity for small sums, That

the Chancery Court could not have any cognizance of to the great loss and prejudice of several of the poorer sort of People and Ruin of Some." Whereupon it was provided that in all actions in the County Court below the amount necessary to bring the case within the Jurisdiction of the Court of Chancery — "The Justices of the County Court may and shall (at the Prayer of either Plaintiff or Defendant) — hear and determine the same according to the Rules of Equity and Good Conscience as fully as the Chancellor might do in any case within the Jurisdiction of the Chancery Court."

Though passed more than fifty years after the expiration of the acts vesting Equity Powers in the County Court it is clear that this Act is of the same tenor and purport as the former. We may regard it as *reviving* and enlarging the old jurisdiction of the County Courts which expired in 1672, not as much a new departure as a *reversion* to the former and well known system of Jurisprudence, prevailing not only in Maryland but in its close neighbor, Virginia, since 1645.

From the point of view of this Chapter, it appears that the County Courts exercised a quasi Equitable Jurisdiction from 1642 to 1676; that this Jurisdiction was revived by the Act of 1723 and continued with increasing clearness of outline to our own day.

CHAPTER VIII.

CONSTITUTION OF THE BODIES EXERCISING JUDICIAL POWER. 1637-1665.

THE ASSEMBLY.

In the Commission of April 15th, 1637, appointing Leonard Calvert, Governor, Chief Magistrate and Chancellor, he is granted "absolute power and authority — when and as often as he shall think fit to call and summon" an Assembly of the "freemen" of the Province. In the second Commission of September 1642, this power is continued with the addition that the Assembly was to consist of the "freemen of the Province or their deputies." The same authority was contained in every Commission from the Lord Proprietary appointing a Governor and it was through the exercise of this power, that the Assembly was lawfully convened.

In the first and second Assemblies the Burgesses were called by writs of summons, but with the third Assembly this method was superseded by writs of election. They issued from the Governor and were directed to the Sheriff of each County, commanding him to proclaim a day for the election of Burgesses, who were to be chosen from each Hundred. After the election the Sheriff would return the writ with the name of the Burgesses elected for that County. As appears from the language of the Commission the Assembly was to be composed of all the freemen of the Province or their deputies.

Until 1650 the Assembly consisted of one Chamber, but under the Proclamation of the Governor convening it for that year, it divided into an "Upper" and "Lower House," the latter being called the "Burgesses."

Each house organized separately and passed rules for the transaction of business. Previous to the separation the Assembly was presided over by the Governor and Secretary of

the Province but from this time the Burgesses elected their own "Speker" and "Clerke." The Upper House consisted of the Governor and Secretary and the Members of the Council.

This revolution in the constitution of the Legislature was confirmed by Act of this same Assembly of 1650, in which both houses joined, entitled "An Act for the settling of the Present Assembly by two distinct houses."

A peculiar quarrel arose between the two Chambers in the Session of 1659–60. How the controversy originated is not disclosed, but it is supposed to have been instigated by Governor Fendall.

The Burgesses claimed that "being a lawful Assembly without dependence upon any other power in the Province now in being, (it) is the highest Court of Judicature."

Their real contention was to the effect that with them alone rested the initiative in proposing legislation and enacting laws. They would not admit that the Upper House had even the limited powers of assent and dissent enjoyed by the Lords of England. To quote their own language, "they would not allow the Upper House to be an Upper House." The cause of this controversy has never been commented upon by writers dealing with this period, but it is no doubt similar to that which led to a like controversy between the Upper and Lower Houses in one of the New England Colonies. In this latter case it was the desire of the Lower House to compel the members of the other House, to sit with them when passing laws; the reason being that when sitting together, the Burgesses being largely in the majority could easily outvote the members of the Upper House. The scheme might have worked but it is highly doubtful, when we remember that the Lord Proprietary, by appointing a sufficient number of Councillors, could have swamped the Burgesses with facility. As it was the Upper House treated the matter somewhat contemptuously and as no decision was ever reached the victory rested with it.

We have now reached a period (1660) where the Government of the Province assumed a form which it maintained until the Revolution. The Executive was the Governor, acting with the ad-

vice of his Council. The Legislature consisted of the two houses of the Assembly; the Upper, composed of the Governor, Secretary and Council, and the Lower of the Burgesses who were elected from the freemen of the Province.

THE PROVINCIAL COURT.

This Court was the chief Judicial body in the Province. It was the Court of original jurisdiction in all cases, civil as well as criminal for the County of St. Mary's, for which, in the beginning it was constituted. As other Counties were erected and County Courts established, it had appellate jurisdiction over these Courts where the amount involved was over 2,000 lbs. of tobacco in value.

As was commented upon in a preceding Chapter, we find no evidence indicating the origin or pointing to the source of the establishment of this Court, but it was in operation as early as 1637.

When it sat as a Court of Chancery, it was composed of the members of the Council as associate Judges and down to the year 1661 (the date of the appointment of Philip Calvert) was presided over by the Governor who was also the Chancellor.

The Members of the Council who composed this Court were appointed by Commission directly by Lord Baltimore or by the Lieutenant Governor under the powers granted him in his commission. Before entering upon the discharge of his duties, which were administrative and legislative, as well as judicial, each Councillor was required to take the "Councillor's Oath."

In one form, which has been preserved under the date of February 1643, we see the stress laid upon the judicial function by the promise that "I will administer equal justice to all persons according to the Laws of the Province to the best of my skill and power, when I shall exercise any act of Judicature."

The Court was attended with all the pomp and circumstance that befitted the highest Judicial Body of the Province. It was usually opened by "tuck of drum" and the Council-

lors were obliged to appear in Court each with "his ribon and meddle upon paine of a noble for every default."

Lest it should happen that the charm of office should fail to provide a full bench, each Councillor was subject to (and sometimes paid) a fine of forty shillings for his absence.

If we recall the fact that the Provincial Court performed a triple function, we will not be surprised at the bewildering profusion and variety of its records, since it was not only a tribunal in which litigation was conducted, but it was the office in which Wills were proven and estates administered in addition to being the "Record Office" for the Province.

The records and proceedings are entered without any attempt at classification or arrangement.

Depositions, Indemnity Bonds, Contracts, Deeds, Brands to distinguish cattle, Wills, Administrations, Confessions of judgments are interspersed everywhere among the judicial proceedings. The records of the latter vary in completeness from a mere statement of the parties and the form of action, to the declaration, containing an account of the facts out of which the suit arises, the plea or defense, the testimony oral or by deposition and finally the judgment of the Court.

Sometimes, but infrequently it is true, the judgment would be accompanied by an opinion in its support. Probably the first of its kind in the History of the State, is the opinion pronounced by the three Judges in the case of *Cornwalleys vs. Calvert* in January 1643 in which two concurred and one dissented.

The Court, as has been previously stated also acted as a Court of Appeals for the County Courts and the first recorded evidence of the exercise of that jurisdiction occurred when Thomas Weston appealed from the judgment in favor of John Wyatt given in the County Court of Kent Island.

THE CHANCELLOR.

In the early days of the Province, the offices of Chancellor and Governor, were filled by the same person, appointed by Commission from the Lord Proprietary. The first as we have seen, was Leonard Calvert, nominated under the famous Commission of 1637. That document, as well as those which followed it, contained a provision, that in the event of the death

or absence of the Governor, he had the power to name his successor. This power was frequently exercised, one of the first instances being the appointment by Governor Leonard Calvert, who was departing for England, of Giles Brent, Governor and Chancellor.

The second Chancellor was Thomas Greene, who was appointed Governor, etc. by Leonard Calvert, on his death-bed in June 1647. Greene held his position only long enough for the Lord Proprietary to appoint William Stone "Lieutenant, Governor and Chancellor" in August 1648. During the period of the Commonwealth, Stone was continued in office, but was finally superseded by Fuller, who was appointed by Cromwell's Commissioner for the Plantation.

Upon his restoration in 1656, Calvert appointed Josias Fendall "Lieutenant and Chief Governor" without referring to the office of Chancellor. It is scarcely probable that this omission has any significance, though it is not until 1661, that the office is again mentioned. The appointment expressly stated that Fendall was to be Lieutenant and Governor "in as ample and large a manner as was formerly granted by us to William Stone, our late Lieutenant."

In June 1660, Fendall, being deposed for his part in the conspiracy which we have heretofore remarked upon, Lord Baltimore appointed his brother Philip Calvert, "Lieutenant and Governor," the Commission remaining silent as to the office of Chancellor, though it is clear as appears by the next Commission that Philip also occupied that position.

This Commission, September 14th, 1661 ushers in an event of considerable importance in the judicial history of the Province. For the first time the Chancellor and Governor cease to be one and the same person.

It stated, that Charles Calvert (son of the Lord Proprietary) was to be Lieutenant Governor "except that our said brother (Philip) is still to continue and remaine our *Chancellor* and Keeper of our Great seal."

From this time the Chancellor receives his appointment as such by Commission, directly from the Lord Proprietary. He acts in the Provincial Court with the members of the Councill as associates, and in the Court of Chancery with his "assist-

ants" but has no power as Chancellor, except when acting in conjunction with them.

It was not until the appointment of William Holland, Feb. 27, 1719, that the Chancellor sat as sole Judge.

Before he could act he was obliged to take the "Chancellors' Oath." Its form is preserved in the oath administered to Governor Stone, August 1648, who swears,— "I will faithfully serve his Lordship as his Chancellor and Keeper of his Great Seal."